Brownfields for Bankers – Understanding Lender Environmental Liability

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THE GOLDSTEIN ENVIRONMENTAL LAW FIRM

Sources of Environmental Contamination

- Dry-cleaners
- Gas stations
- Manufactured gas plants
- Wood treatment facilities
- Wastewater treatment plants
- Mine-scarred lands
- Abandoned factories

Impacts to Lenders

- Indirect
  - Borrowers' ability to repay loan
  - Comprised value of collateral
  - Reputation
- Direct – Oversight at Various Government Levels
  - Liability based on federal law
    - CERCLA
    - RCRA
  - Liability based on state law

Key Federal Statutes

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): 42 U.S.C. § 9601 et. seq.
- Resource Conservation and Recovery Act (RCRA): 42 U.S.C. § 6901-6992k

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

- The “Superfund” governs liability for the cleanup of a release of hazardous substances from a facility into the environment.
- Provides mechanism for imposing liability on a range of parties for past and future cleanup costs of site.

CERCLA Liability

- Strict, Join, and Retroactive Liability
- Four categories of potentially responsible parties ("PRPs"):
  1. Current owner or operator of contaminated property;
  2. Owner or operator at the time of disposal of any hazardous substance;
  3. Any person who arranged for the disposal or treatment of hazardous substances; and
  4. Any person who accepts hazardous substances for transport to property and selects disposal site.

CERCLA's "Secured Creditor Exemption"

- To facilitate lending for contaminated properties, CERCLA contains a secured creditor exemption from the owners/ operator definition for "a person that is a lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility."
- 42 U.S.C. § 9601 (20)(E)

CERCLA Liability Unintended Consequences

- *United States v. Fleet Factors Corp*., 901 F.2d 1550 (11th Cir. 1990)
  - Lender held a security interest in a cloth printing facility that was the subject of a hazardous waste clean-up by the Environmental Protection Agency. Subsequently, the United States government sued the owners, stockholders of the facility, and the lender to recover the cost of the cleanup under CERCLA.
  - Court found that the lender was not entitled to CERCLA's secured creditor exemption because actions rose to the level of involvement in management, which demonstrated "a capacity to influence the corporation's treatment of hazardous waste."

Congress Responds

- CERCLA Amendments
  - Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 (Lender Liability Act)
  - “The term ‘owner or operator’ does not include a . . . lender that did not participate in management . . . of a facility . . . If the person seeks to sell, re-lease . . . or otherwise divest . . . at the earliest practicable, commercially reasonable time, on commercially reasonable terms.”

Scope of Exemption

- Lender
  - “Lender” defined broadly to include a traditional financial institution and any person who extends credit, takes a security interest, guarantees credit against default, or provides title insurance.

Scope of Exemption

- Statutory scheme provides specific activities excluded from the definition of “participation in management”:
  - Holding or abandoning a security interest;
  - Including a covenant, warranty, or other term or condition that relates to environmental compliance;
  - Monitoring or enforcing the terms and conditions of the extension of credit or security interest;
  - Monitoring or inspecting the facility;
  - Requiring a response action to address a release or threatened release;
  - Providing financial or other advice to mitigate, prevent, or cure default or diminution in the value of the facility
  - Restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest;
  - Exercising other remedies that may be available under applicable law for breach of a term or condition of the extension of credit or security agreement; or
  - Conducting a response action under 42 U.S.C. § 9607(d).

Participation in Management

- Lender may go too far and exercise decision-making control with respect to environmental compliance or overall operational functions.
- *New York v. HSBC USA N.A.,* No. 07-3160 (S.D.N.Y. May 30, 2007)
  - Lender paid $850,000 in civil penalties and reimbursement to the State of New York for costs incurred as a result of the abandonment of hundreds of drums, tanks, and containers.
  - After default, the borrower chemical company, requested that the lender fund the disposal of hazardous material and winterization of the facility as part of winding down.
  - The lender refused the request, and as a result, pipes burst and hazardous materials were “abandoned.” The lender did not notify the State of the environmental issues at the property.
  - The New York Department of Environmental Conservation asserted that the lender was not entitled to the secured creditor exemption because it became involved in the management of the facility because its refusal to correctly dispose and winterize the facility amounted to an exercise of control over the site.

To Protect the Security Interest

- *Georgia-Pacific Consumer Products LP v. NCR Corp.,* 980 F.Supp. 2d 821 (2013)
  - The defendant's predecessor entered into a lease agreement, wherein it retained both a commercial interest and an oversight role in a mill facility.
  - In a CERCLA action, the defendant relied on the secured creditor exemption based on financing language contained in the lease agreement. However, the Court found that the defendant had ownership and operational responsibility for the mill, and did not hold ownership "primarily to protect a security interest," to qualify for the exemption.
  - "The secured lender exemption from ownership liability is properly limited to those persons whose connection to a facility is simply as an arms-length provider of capital otherwise free of entanglements to the Site."

Scope of Exemption

- EPA provides guidance regarding the “earliest practicable” or “commercially reasonable” language in the exemption.
- The “test will generally be met if the lender, within twelve months of foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication.”

Earliest Practicable and Commercially Reasonable

- *U.S. v. Pesses*, No. 90-0654, 1998 WL 937235 (W.D. Pa. May 6, 1998)
  - After default, the lender engaged in an active attempt to locate new tenants or purchasers. Notwithstanding its continued marketing efforts, the lender did not receive any bona fide offers. After three years, lender mailed keys to the facility to the Bankruptcy Trustee concluding that further efforts to repay the borrower's loan out of the collateral property would be futile.
  - The Court found the lender's course of conduct satisfied exemption requirements even though three years passed between the borrower's default and the decision by lender to divest property, because the lender acted in a "reasonably expeditious manner."

Resource Conservation and Recovery Act (RCRA)

- Provides a comprehensive regulatory structure for managing both hazardous and non-hazardous solid wastes.
- EPA has authority to control hazardous waste from “cradle-to-grave.”
  - Includes generation, transportation, treatment, storage, and disposal of hazardous waste and nonhazardous waste, such as petroleum-related materials.

RCRA Liability

- Statute imposes liability on “owners and operators” of facilities that generate, transport, treat, or dispose of hazardous waste.
- Two sources of liability under RCRA may cause concern for lenders:
  - Leaking underground storage tanks (LUSTs); and
  - A citizen’s suit for an “imminent and substantial endangerment” to public health or the environment.

RCRA's UST Secured Creditor Exemption

- A "holder" who has indicia of ownership in UST Property will not be responsible for complying with the UST requirements for owners and operators if:
  - The indicia of ownership is held primarily to protect a security interest;
  - The lender has no control of or responsibility for a tank's daily operations prior to foreclosure; and
  - The lender is not engaged in petroleum production, refining, and marketing.
- 42 U.S.C. §6991b(h)(9)
- Prior to foreclosure, the RCRA UST and CERCLA secured creditor exemption provisions are equivalent.

Scope of Exemption

- Participation in Management
  - “Actual participation by the [lender] in the management or control of decision making related to operation of an UST or UST system. Participation in management does not include the mere capacity or ability to influence or the unexercised right to control UST or UST system operations.”
  - 40 C.F.R. §280.210(a)(1)

Post-Foreclosure Provisions

- Once a lender takes control or ownership of the property, it may become liable under RCRA if no other party can be held liable unless the lender:
  - Empties all known USTs and UST systems within 60 calendar days after foreclosure;
  - Empties newly discovered USTs within 60 days of discovery; and
  - Temporarily or permanently closes USTs.

Creating Safe, Reliable, Predictive & Inviting Climate for Private Capital Investment in Brownfields Redevelopment

United States Environmental Protection Agency | Solid Waste and Emergency Response 5403W | EPA 510-F-95-004 September 1995

Office of Underground Storage Tanks

Environmental Fact Sheet

EPA's Lender Liability Rule for Underground Storage Tanks

Background

Many underground storage tank (UST) owners and operators, particularly small businesses, need capital to make improvements to their facilities to comply with a broad spectrum of environmental regulations. EPA is particularly concerned about the ability of UST owners and operators to comply with federal UST upgrading and replacement requirements. The uncertainty of the liability of secured creditors (financial institutions and others who extend secured loans) regarding UST properties that they hold as collateral has had a chilling effect on lenders' willingness to make loans to UST owners. This rule should remove a current barrier to the financing of UST facilities and result in greater capital availability for UST owners and operators. In addition, this rule supports the Clinton Administration's Brownfields Economic Redevelopment Initiative, which is intended to demonstrate ways to return abandoned, contaminated urban sites to productive use and to ensure future development is done in a sustainable, environmentally sound manner.

Subtitle I of the Resource Conservation and Recovery Act (RCRA) contains a "security interest exemption" that provides secured creditors ("lenders") an explicit statutory exemption from corrective action (cleanup) liability for releases from petroleum USTs. However, many lenders are unaware of the existence of this exemption, and many others are uncertain about its scope of coverage. Further confusion has resulted from various court cases regarding Superfund lender liability. In 1994, the D.C. Circuit Court of Appeals vacated EPA's Superfund lender liability rule, which attempted to clarify the security interest exemption in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The court decision and EPA's Superfund rule were limited to actions taken under CERCLA and do not affect today's UST rule.

Action Taken

The UST-specific lender liability rule was published in the *Federal Register* on September 7, 1995. This final rule specifies conditions under which certain secured lenders may be exempted from RCRA Subtitle I regulatory requirements for petroleum underground storage tanks. Under the rule, a lender is eligible for an exemption, both prior to and after foreclosure, from compliance with all Subtitle I requirements as an UST "owner" and "operator" if the lender: 1) holds an ownership interest in an UST, or in a property on which the UST is located, in order to protect its security interest (a lender typically holds property as collateral as part of the loan transaction); 2) does not engage in petroleum production, refining, and marketing; and 3) does not participate in the management or operation of

over

the UST. A lender also must empty its UST(s) within 60 days after foreclosure, and either temporarily or permanently close the UST(s) unless there is a current operator at the site (other than the lender) who can be held responsible for compliance with UST regulatory requirements.

Discussion

EPA believes that a lender holds only limited ownership rights when it takes possession of an UST property primarily to protect a security interest. These limited ownership rights do not rise to the level of full ownership sufficient to make the lender an "owner" of the UST(s) under RCRA Subtitle I, provided the lender meets the criteria specified in today's rule (i.e., holds indicia of ownership primarily to protect a security interest without participating in management of an UST or engaging in petroleum production, refining, and marketing).

By foreclosing, a lender takes control of and responsibility for the UST, thus potentially subjecting it to all Subtitle I requirements that an "operator" must meet. Under today's rule, however, a lender is exempt from the federal UST regulatory requirements as an operator if: 1) there is a current operator at the site who can be held responsible for compliance with Subtitle I regulatory requirements; or 2) the UST(s) are emptied within 60 days after foreclosure and the lender either temporarily or permanently closes the UST(s).

A lender who chooses to participate in management of or continue operation of its USTs through storage, filling, or dispensing of petroleum is not eligible for the regulatory exemption and faces potential UST regulatory responsibility for corrective action in the event of a release. The lender may also be responsible for compliance with the UST technical standards and financial responsibility requirements under Subtitle I of RCRA.

In contrast to operating an UST system, the rule allows a lender to participate in a wide range of administrative and financial management activities for USTs as well as to undertake activities to protect human health and the environment. Among the activities that a lender may perform without incurring liability under RCRA Subtitle I are loan origination, loan policing and work out, foreclosure on and sale of the UST or UST property, environmental inspections or audits, corrective action for releases from USTs, and emptying and closing USTs.

Contact

The rule, titled "Underground Storage Tanks—Lender Liability," amends the *Code of Federal Regulations* at 40 CFR Parts 280 and 281. For additional information or for a copy of the *Federal Register* notice, including electronic access on the Internet or EPA's CLU-IN system, contact EPA's RCRA/Superfund Hotline, Monday through Friday, 8:30 a.m. to 7:30 p.m. EST. The national toll-free number for callers outside the Washington, D.C., service area is 1 800 424-9346; callers within the Washington, D.C., area must use 703 412-9810. For the hearing impaired, the number is TDD 1 800 553-7672, or 703 412-3323 (local).

State Law

- Lenders may still face liability under state laws, even if in compliance with CERCLA and RCRA.
- Approximately two-dozen states have enacted some lender liability protection in state “mini-CERCLAs.”
  - Florida
  - Kentucky

Florida

- Section 376.308(3), Florida Statutes (F.S.), provides a defense for lenders for sites contaminated with petroleum or petroleum products.
- Brownfields Redevelopment Act, §§ 376.77-376.86, F.S., provides incentives to parties who voluntarily cleanup contaminated sites, including liability protection.

Kentucky

- Kentucky Revised Statutes (KRS) 224.1-400, provides liability protection to financial institutions acquiring property or serving as a fiduciary.

- The Brownfield Redevelopment Fund, KRS 224.1-030, provides incentives to parties who voluntarily cleanup contaminated sites, including liability protection.

Kentucky Brownfield Redevelopment Program

- The program was developed with specific provisions to encourage lending on brownfield properties. A bank may require a borrower to include a scenario in their Property Management Plan to address what occurs if operations cease at a property. If the Property Management Plan includes these provisions, a bank can foreclose on a property where the owner held a Notification of Concurrence and use the same Property Management Plan in their package.

Contractual Risk

- *Hoang v. California Pacific Bank*, 2014 Cal. App. Unpub. LEXIS 5230 (July 23, 2014)
- A foreclosing lender was ordered to pay $2 million judgment for failure to complete remediation on former dry-cleaning property.
- The lender complied with CERCLA and the state secured creditor exemption by foreclosing and then quickly selling the property. However, the lender contractually agreed to the buyer to remediate the property within a “reasonable time period.”
- The plaintiff purchaser brought a successful contract claim because the Court found the lender did not meet its obligation to cleanup.

Managing Environmental Risk

- Know your Federal and State Statutory Protections
  - Statutory Exemptions
    - Avoid operations and management activities
    - After foreclosure, divest ownership at “earliest practicable, commercially reasonable time.”
  - Brownfield Programs
- Environmental Assessment and Due Diligence
  - Fully Evaluate a Property Before Extending Credit
- Secured Creditor Environmental Insurance

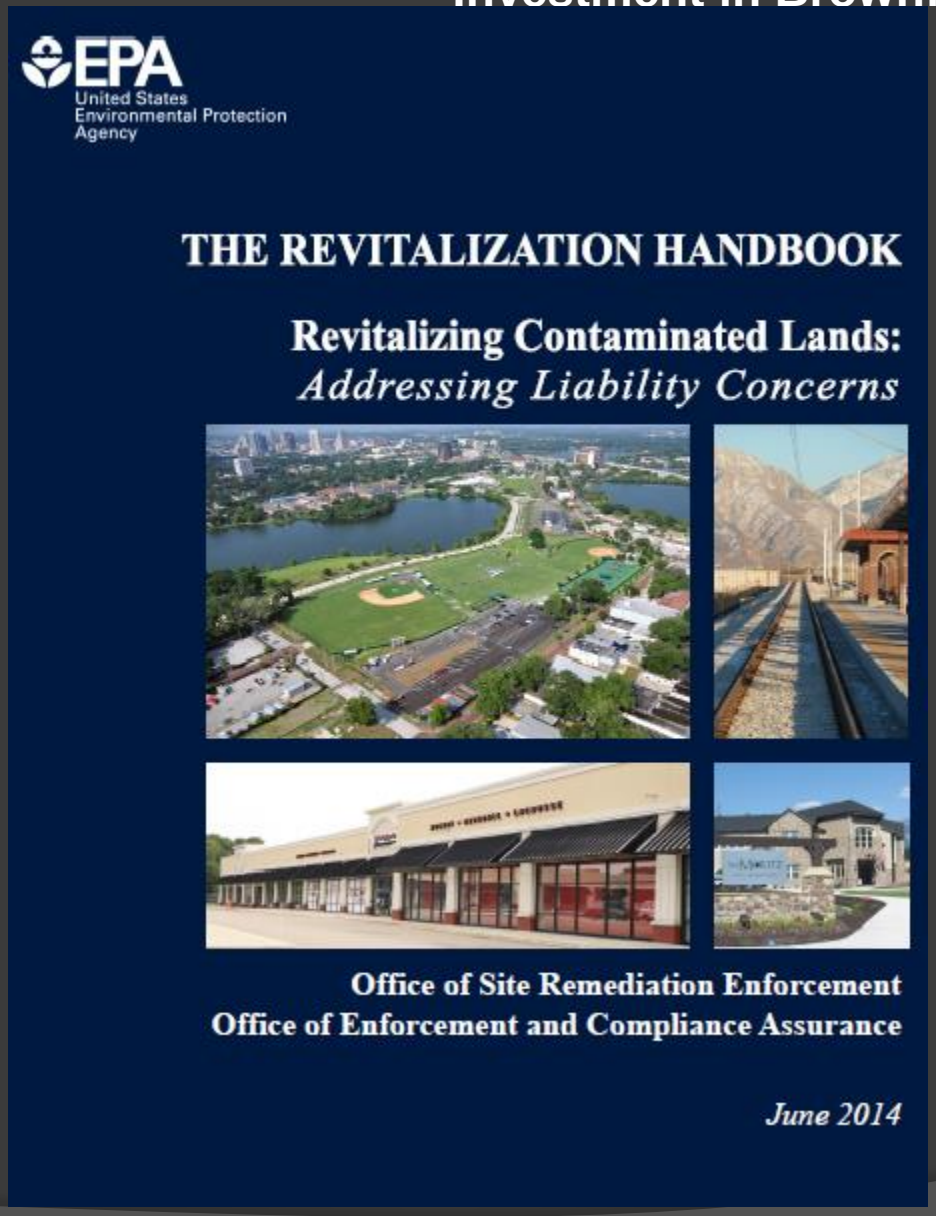
EPA Guidance Documents

- The Revitalization Handbook, Revitalizing Contaminated Lands: Addressing Liability Concerns, United States Environmental Protection Agency, Office of Site Remediation Enforcement, Office of Enforcement and Compliance Assurance, June 2014.

- CERCLA Lender Liability Exemption: Updated Questions and Answers, United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance, July 2007.

- CERCLA, Brownfields, and Lender Liability, United States Environmental Protection Agency, Office of Solid Waste and Emergency Response, April 2007.

Creating Safe, Reliable, Predictive & Inviting Climate for Private Capital Investment in Brownfields Redevelopment



- Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601
- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 et seq.

Defenses to Liability:

- Bona Fide Prospective Purchasers
- Contiguous Property Owners
- Third-Party Defense
- Innocent Landowner Liability; and
- Common Elements Guidance
- Secured Creditor Exemption

Liability Management Strategies:

- Ready for Reuse Documentation
- Comfort Letters
- Prospective Purchaser Agreements

Creating Safe, Reliable, Predictive & Inviting Climate for Private Capital Investment in Brownfields Redevelopment

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Creating Safe, Reliable, Predictive & Inviting Climate for Private Capital Investment in Brownfields Redevelopment

Innovative Solutions Prove The Value in Brownfields Lending

Brownfields redevelopment plans along the river in Des Moines, Iowa.

Finding Unique Financing Solutions

While redeveloping brownfields makes environmental sense, often the deciding factor in returning abandoned properties to productive use is whether a particular deal makes financial sense. Financial institutions make that determination based on a number of factors, including a firm understanding of the potential returns and a fair characterization of the risks. The Cities of Des Moines, Iowa and Wheeling, West Virginia have each collaborated in a unique way—with a federal lender and a local, community-based financial institution—to complete both a picture of the risks and rewards and a financing package for redevelopment. The results of these innovative collaborations not only include cleaned up and redeveloped properties, new businesses, and new jobs, but also increased confidence for financing entities that brownfields lending can make sense.

For Des Moines, Iowa, a $2 million injection from the Federal Home Loan Bank (FHLB) is what private lenders and developers needed to make the city's Riverpoint West project more viable. Des Moines received an EPA Brownfields Assessment grant in August 1998 and started performing environmental assessments on more than 100 properties throughout the Des Moines area. With the objective to redevelop blighted and underutilized industrial tracts of land, the city set out to leverage funding to complete redevelopment on targeted properties.

South of downtown Des Moines, a former steel foundry, chemical manufacturing facility, and rail yards scar approximately 300 acres along the Raccoon River. A $200 million redevelopment project that will create more than 750 housing units and 450,000 square feet of commercial and retail space is expected to rejuvenate the 125-acre developable area, helping to extend the diversity of services offered and support commercial uses for downtown. Des Moines Brownfields Showcase Community Pilot Manager Ellen Walkowiak explains, "A representative from the Federal Home Loan Bank of Des Moines became familiar with the project and helped the FHLB take an innovative approach to financing the project. The FHLB's use of funds as an equity investment is the first of its kind in the nation." FHLB's equity investment will make the financial breakdown more attractive to lenders because the loan to value (LTV) ratio will be more favorable and less risky.

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JUST THE FACTS:

- The Cities of Des Moines, Iowa and Wheeling, West Virginia each discovered unique financing collaborations that enabled their brownfields redevelopment projects to move forward.
- In Des Moines, 125 acres that encompass a former steel foundry, chemical manufacturing facility, and rail yards are being redeveloped into more than 750 residential units and 450,000 square feet of commercial and retail space through a financing arrangement with the Federal Home Loan Bank.
- The Wheeling, West Virginia Brownfields Pilot collaborated with federal agencies and multiple local organizations to obtain financing for the transformation of three former warehouses into a new, multi-million dollar business plaza.

"A representative from the Federal Home Loan Bank (FHLB) of Des Moines became familiar with the [$200 million, mixed-use, brownfields redevelopment] project and helped the FHLB take an innovative approach to financing the project. The [bank's] use of funds as an equity investment is the first of its kind in the nation." — Ellen Walkowiak, Des Moines Brownfields Showcase Community Pilot Manager

"Brownfields properties often appraise at lower dollar amounts due to perceived or potential environmental risks or the often deteriorated condition of nearby properties"...but after site cleanup the properties start to turn around and appraise for higher amounts.

September 2004

CERCLA, BROWNFIELDS, and LENDER LIABILITY

What is CERCLA?

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) authorizes the U.S. Environmental Protection Agency (EPA) to respond to human health and environmental hazards posed by hazardous substances at properties. Under CERCLA, EPA can require liable parties to conduct cleanups or EPA can conduct a cleanup and subsequently seek cleanup costs from liable parties. Section 107 of CERCLA defines a liable party as: (1) the current *owner and operator* of a contaminated property; (2) any *owner or operator* at the time of disposal of any hazardous substances; (3) any person who arranged for the disposal or treatment of hazardous substances, or arranged for the transportation of hazardous substances for disposal or treatment; and (4) any person who accepts hazardous substances for transport to the property and selects the disposal site.

Under Section 101(20)(A) of CERCLA, a person is an "owner or operator" of a facility (or property) if that person: (1) owns or operates the facility; or (2) owned, operated, or otherwise controlled activities at that facility immediately before title to the facility, or control of the facility, was conveyed to a state or local government due to bankruptcy, foreclosure, tax delinquency, abandonment or similar means.

Are Lenders Liable for Contamination under CERCLA?

Banks that hold mortgages on property as secured lenders are exempt from CERCLA liability, if certain criteria are met. CERCLA Section 101(20) contains a secured creditor exemption that eliminates owner/operator liability for lenders who hold ownership in a CERCLA facility primarily to protect their security interest in that facility, provided they do not "participate in the management of the facility." Generally, "participation in the management" may apply if a bank exercises decision-making control over a property's environmental compliance, or exercises control at a level similar to that enjoyed by a manager of the facility or property. "Participation in management" does *not* include actions such as property inspections, requiring a response action to be taken to address contamination, providing financial advice, or renegotiating or restructuring the terms of the security interest. In addition, the secured creditor exemption provides that simply foreclosing on a property does not result in liability for a bank, provided the bank takes "reasonable steps" to divest itself of the property "at the earliest practicable, commercially reasonable time, on commercially reasonable terms." Generally, a bank may maintain business activities and close down operations at a property, so long as the property is listed for sale shortly after the foreclosure date, or at the earliest practicable, commercially reasonable time.

How Did the "Brownfields Amendments" Change CERCLA Liability?

In 2002, Congress passed the "Small Business Liability Relief and Brownfields Revitalization Act" (Brownfields Amendments). These amendments created a new landowner liability protection from CERCLA for bona fide prospective purchasers ("BFPP"). Prior to the Brownfields Amendments, a person who purchased property with knowledge of the contamination was subject to "owner or operator" liability under CERCLA. Since the enactment of the Brownfields Amendments, prospective landowners may now purchase property with knowledge of contamination and obtain protection from liability, provided they meet certain pre- and post-purchase requirements.

To qualify as a BFPP, a person must: (1) not be potentially liable for contamination on or at a property; (2) acquire the property after January 11, 2002; (3) establish that all disposal of hazardous substances occurred before the person acquired the facility; (4) make *all appropriate inquiries* into previous ownership and uses of the property *prior to* acquiring the property; and (5) not be affiliated with a party responsible for any contamination.

In addition, after purchasing a property, to maintain BFPP status, landowners must comply with "continuing obligations" during their property ownership. To comply with the continuing obligations, BFPPs must: (1) provide all legally required notices with respect to the discovery or release of a hazardous substance; (2) exercise appropriate care with respect to the hazardous substances by taking reasonable steps to stop or prevent continuing or threatened future releases and exposures, and prevent or limit human and environmental exposure to previous releases; (3) provide full cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration; (4) comply with land use restrictions and not impede the effectiveness of institutional controls; and (5) comply with information requests and subpoenas. For more information on continuing obligations see: http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf

What is "All Appropriate Inquiries?"

"All appropriate inquiries" (AAI) is the process of evaluating a property's environmental conditions and assessing potential liability for any contamination. EPA issued standards and practices for conducting all appropriate inquiries (70 FR 66070) that became effective on November 1, 2006. The AAI requirements are applicable to any party who may potentially claim protection from CERCLA liability as an innocent landowner, a bona fide prospective purchaser, or a contiguous property owner. EPA recognizes the *ASTM E1527-05 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process* as fully compliant with the AAI final rule. For more information on the AAI requirements see: http://www.epa.gov/brownfields/regneg.htm

How Does AAI Apply to Lenders?

The AAI rule primarily applies to borrowers who want to claim protection from CERCLA liability as innocent landowners, bona fide prospective purchasers or contiguous property owners. The rule does not change the CERCLA liability exemption for banks that hold mortgages on property as secured lenders. The secured lender exemption is *not* conditioned upon a bank or lender undertaking AAI prior to issuing a mortgage or prior to the property being purchased by the borrower.

Although banks and lenders are afforded protection from CERCLA liability through the secured creditor exemption, banks may choose to further protect themselves from loss (due to decreases in the value of the property or collateral) by requiring that borrowers qualify for liability protections. Banks therefore may want to encourage their borrowers to comply with the provisions established for BFPPs and ensure that borrowers properly conduct AAI prior to acquiring a property.

It is important to note that it is still possible for a bank or lender to be liable for contamination on or at a property, if it is found to be acting as either an owner or operator of a contaminated property. See information above for an explanation of the secured creditor exemption and the definition of "participation in the management" of a property. Also, even if a financial institution qualifies for the secured creditor exemption from CERCLA liability, it is still possible that a particular state may have stricter laws governing lender liability for contaminated properties.

Brownfields Fact Sheet
CERCLA, Brownfields, and Lender Liability

Solid Waste and Emergency Response (5105)

EPA 560-F-07-234
April 2007
www.epa.gov/brownfields

Lender's Environmental Risk

- "Land Pollution, Environmental Risks and Bank Lending: An Empirical Analysis,"
  ELR 17 4 (237), ELR 17 4 (237) (2015).
- "Secured Creditors: Exempt from Liability?,"
  46 Ariz. St. L.J. 489 (2014).
- "As if it Isn't Enough to Have a Non-performing Loan: Dealing with Environmentally Impacted Distressed Assets,"
  41 Tex. Envtl. L.J. 29 (2010).
- "The HSBC Bank Settlement: Revisiting Lender Liability,"
  21 J. Tax'n F. Inst. 5, 21 J. Tax'n F. Inst. 5 (2007).
- "Feature, CERCLA and RCRA: Minimize Your Liability,"
  18 GPSolo 20 (2001).
- "The Green Nexus: Financiers and Sustainable Development,"
  13 Geo. Int'l Envtl. L. Rev. 899 (2001).

Performing Due Diligence Prior to Foreclosure

- *Forest Park Nat'l Bank & Trust v. Ditchfield, 881 F. Supp. 2d 949, 2012 U.S. Dist. LEXIS 103007, 2012 WL 3028342 (N.D. Ill. 2012)*
  - Lender foreclosed on property adjacent to a dry cleaning facility, but performed no due diligence on property before foreclosure.
  - After taking possession, Lender conducted a Phase II and discovered PCE concentrations exceeding the state soil and groundwater remediation levels. The lender then filed a lawsuit against the adjacent property owner under RCRA and CERCLA.

Environmental Insurance Coverage

- Pollution liability insurance
- Remediation liability insurance
- Contaminated property development insurance
- Lender environmental protection insurance
- Indoor air quality and mold insurance

Environmental Insurance Coverage

Lender Portfolio Program

Environmental Risk

Protecting a lender from environmental liability and the risk that can be associated with Other Real Estate Owned properties is the goal of the Environmental Insurance Portfolio Program.

Environmental Lender Portfolio Program

Hylant created this program specifically for lenders and has worked closely with lenders and the insurance underwriter to develop specific coverages and additional enhancements.

- Liability arising from a pollution condition associated with default ownership for distressed assets is transferred to an insurance product.
- Portfolios provide protection at a lower cost, based on the fact that the associated risks are being shared among a number of sites as opposed to a specific risk associated with a single site.
- Environmental liability insurance benefits are transferable to a new owner, ultimately adding to the future marketability of a distressed asset.

Key Coverage Elements of the Program

- Up to a five year policy term per asset with renewal options
- Insurance response for governmentally mandated clean-up orders
- Insurance response for third-party property damage claims (includes loss of use, diminution in value and natural resource damage)
- Insurance response for third-party bodily injury claims (includes medical monitoring, emotional distress, mental anguish)
- Legal defense costs
- Coverage add-back for known pollution conditions (reopener feature) upon findings of no further action
- Stand-alone exit policy for future buyer
- Legacy coverage for lender when insured locations are sold

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Real Estate Brownfield Development

Environmental Risk

Providing comprehensive solutions for environmental liabilities and exposures related to the redevelopment of industrial property.

Managing environmental risk is a key component of Brownfield Development. Hylant's Environmental Risk practice has extensive environmental industry experience and provides comprehensive client support services for environmental liabilities and exposures related to the redevelopment of industrial property.

Our team of experts offers risk management and insurance solutions that manage exposures related to the following environmental risks associated with the acquisition and redevelopment of former industrial sites:

- Pre-existing (historical) pollution conditions from prior operations or land uses
- Indoor air quality exposures at new and/or refurbished facilities
- Natural resource damages
- New pollution conditions related to site remediation, construction and new operations

Covered Expenses:

- First-party cleanup
- Third-party bodily injury and property damage
- Legal defense
- Emergency response
- Business interruption

Hylant also specializes in designing insurance programs to support environmental liability transfers of contaminated properties.

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Brownfields & Property Values

- "Estimating the Impacts of Brownfield Remediation on Housing Property Values," Nicholas Institute for Environmental Policy Solutions at Duke University, Working Paper EE 12-08, August 2012.
  - "The analysis finds evidence of large increases in property values accompanying cleanup, ranging from 5.1% to 12.8%"
- "Using Spatial Regression to Estimate Property Tax Discounts from Proximity to Brownfields: A Tool for Local Policy-Making," Journal of Environmental Assessment and Management (University of Cincinnati), January 2013
  - Assesses the discount in property values due to proximity to brownfields
  - Study included 6,800 properties within 2,000 feet of a brownfield
  - Concludes that City of Cincinnati can recapture $2,262,569 in annual revenue "that could presumably be recovered following brownfield cleanup."
- The Effect of Voluntary Brownfield Programs Program on Nearby Property Values: Evidence from Illinois," Institute for Environmental Science and Policy, University of Illinois, August 2012
  - "Sales prices increase by about 1 percent when a brownfield located 0.25 miles away is certified. Overall, the program has increased the average value of all properties within 1.5 miles of certified sites by about 2 percent. The results provide some evidence of larger effects, of about 4 – 5 percent."

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Special Emphasis on Cleanup and Reuse of Former Fueling Stations, Landfills, Automobile Dealerships, Golf Courses, and Agricultural Sites

- Environmental Due Diligence
- Environmental Liability Analysis and Protection
- Hiring & Management of Qualified Environmental Consultants
- Brownfield Grants
- Brownfield Tax Incentives
- Brownfield Loan Guarantees
- Assistance with Securing Acquisition Financing & Placing Environmental Insurance
- Negotiation of Voluntary Cleanup Agreements & Covenants Not-to-Sue
- Integration of Cleanup and Construction Requirements
- Regulatory Approvals to Build on Contaminated Development Sites